Original No. 2 . OCTOBER TERM, 1915.

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, Complainant,

vs.

STATE OF WEST VIRGINIA, Defendant.

NOTICE OF MOTION FOR WRIT OF EXECUTION.

JOHN GARLAND POLLARD,
Attorney General of Virginia.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

In the Supreme Court of the United States.

ORIGINAL NO. . OCTOBER TERM, 1915.

Commonwealth of Virginia, Complainant,

vs.

State of West Virginia, Defendant.

To the Honorable A. A. Lilly, Attorney General of West Virginia, Charleston, W. Va.

Please take notice that in the suit of Commonwealth of Virginia *vs.* State of West Virginia, pending in the Supreme Court of the United States, at Washington, D. C., the complainant will, on Monday, the fifth day of June, 1916, move the said Court to issue its writ of execution, directed to the Marshal of the said Court against the State of West Virginia, directing the Marshal of the said Court to levy upon the property of the State of West Virginia, subject to such levy, for the satisfaction of the decree and judgment entered on the fourteenth day of June, 1915, in the above entitled cause; and that the Commonwealth of Virginia shall be granted such other and further relief in the premises as may be just and meet; and the said motion will be based on the decree and judgment entered as aforesaid and on the facts stated in the annexed petition and exhibits filed therewith.

Respectfully,

COMMONWEALTH OF VIRGINIA,
By
JNO. GARLAND POLLARD,
Attorney General of Virginia.

Original No. 2 . **OCTOBER TERM, 1915.**

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, Complainant,

vs.

STATE OF WEST VIRGINIA, Defendant.

PETITION FOR WRIT OF EXECUTION.

JOHN GARLAND POLLARD,
Attorney General of Virginia.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

In the Supreme Court of the United States.

ORIGINAL NO. . OCTOBER TERM, 1915.

Commonwealth of Virginia, Complainant,

vs.

State of West Virginia, Defendant.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:—

The petition of the Commonwealth of Virginia by Jno. Garland Pollard, her Attorney General, shows to the Court that:—

I.

The Commonwealth of Virginia filed a Bill in this Court on leave on February 26th, 1906, against the State of West Virginia praying that West Virginia's proportion of the public debt of Virginia, as it stood prior to 1861, be ascertained and satisfied.

II.

On June 14th, 1915, this Court entered its decree and judgment in the suit as follows:

"SUPREME COURT OF THE UNITED STATES.

"Original No. 2. October Term, 1914.

"*Commonwealth of Virginia, Complainant,*

"vs.

"*State of West Virginia, Defendant.*

"This cause came on to be heard on pleadings and "proofs, the reports of the Special Master and the excep-

"tions of the parties thereto, and was argued by coun-
"sel.

"On consideration whereof, the Court finds that the "defendant's share of the debt of the complainant is as "follows:—

"Principal, after allowing credits as stated, $4,215,-"622.28; interest from January 1st, 1861, to July 1st, "1891, at four per cent. per annum, $5,143,059.18; in-"terest from July 1st, 1891, to July 1st, 1915, at three "per cent. per annum, $3,035,248.04, making a total of "interest of $8,178,307.22, which, added to the principal "sum, makes a total of $12,393,929.50.

"It is therefore now here ordered, adjudged and "decreed by this Court that the complainant, Common-"wealth of Virginia, recover of and from the defend-"ant, State of West Virginia, the sum of $12,393,929.50 'with interest thereon from July 1st, 1915, until paid, "at the rate of five per cent. per annum.

"It is further ordered, adjudged and decreed that "each party pay one-half of the costs.

"JUNE 14th, 1915."

III.

The said judgment and decree has ever since remained and is now unpaid. The State of West Virginia has failed to pay the Commonwealth of Virginia the same or any part thereof, although payment has been respectfully requested by the Commonwealth of Virginia of the State of West Virginia.

IV.

The correspondence showing the request of the Commonwealth of Virginia to the State of West Virginia for the payment of said decree and judgment, and the correspondence relating to a proposed joint conference of the Debt Commissions of the two States, as suggested by the West Virginia Commission, are hereto attached and made a part of this petition.

From said correspondence it will appear:—

That on October 19th, 1915, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, addressed a letter to the Governor of West Virginia, requesting that provision be made for the payment of said decree and judgment.

That on October 28th, 1915, the Governor of West Virginia replied that he had convened the West Virginia Debt Commission and in conjunction with them had reached the conclusion that it would be to the advantage of both States to have a joint conference of the Commissions of the two States at the earliest date possible.

That on November 12th, 1915, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, replied suggesting that the proposed joint conference be held on November 23d, 1915.

That on November 12th, 1915, the Governor of West Virginia replied by telegram that he would communicate with the members of the West Virginia Commission and would later reply further, which later reply was duly received November 19th, and was to the effect that the West Virginia Commission would probably not be able to have the joint conference or meeting before some time early in December, of which he would advise the Virginia Commission later.

That on December 6th, 1915, no further advice having been received from the Governor of West Virginia, the Chairman of the Virginia Debt Commission addressed another letter to the Governor of West Virginia, expressing the hope that the Virginia Commission might receive a reply at an early date.

To this letter, addressed on December 6th, 1915, to the Governor of West Virginia, no reply has been received.

Wherefore, your petitioner, Commonwealth of Virginia, prays that a writ of execution may issue from this Court, directed to its Marshal, against the State of West Virginia, directing its Marshal to levy upon any property of the State

of West Virginia, subject to such levy for the satisfaction of the said judgment and decree; and for such other and further relief in the premises as shall seem just and meet.

And your petitioner will ever pray, &c.

COMMONWEALTH OF VIRGINIA,
By
JNO. GARLAND POLLARD,
Attorney General of Virginia.

OCTOBER 19, 1915.

Honorable H. D. Hatfield, Governor of West Virginia, Charleston, W. Va.

DEAR SIR:—In the hope that the State of West Virginia would provide for the payment of the amount of the judgment, viz: $12,393,929.50 with interest, entered against it by the Supreme Court of the United States in favor of the State of Virginia, we have postponed making any formal request.

We have recognized and have appreciated the fact that your State may need reasonable time in order to make the financial arrangements necessary for compliance with the decree of the Court; and any request for such delay will be responded to in the spirit which should govern one State in dealing with another.

Nothing, however, having been done by your State, so far as we are advised, we feel constrained to call the matter to your attention.

Action by the Legislature of your State, will, of course, be necessary in order to comply with the Court's decree, and as we are informed unless convened in extraordinary session upon the call of your Excellency, there will be no session of that body until January, 1917. To postpone until then the beginning of such action as may be necessary to carry out the decree of the Court would involve unreasonable delay. We, therefore, on behalf of the State of Virginia which we represent, respectfully request the State of West Virginia to perform the Court's decree, and to that end that your Excellency will, in the exercise of the power vested in you, convene the Legislature of your State in extraordinary session for the purpose of dealing with this important subject and making provision for the payment of the decree.

We will be indebted to you if you will, at your early convenience, communicate your reply to this letter to the undersigned, Chairman of the Virginia Commission, at Front Royal, Virginia.

Very truly yours,

H. H. DOWNING,
Chairman, Virginia Commission.

28th October, 1915.

My dear Sir:—Upon the receipt of your very courteous letter of the 19th instant, relative to the payment of the judgment of the Commonwealth of Virginia against the State of West Virginia, recently rendered by the Supreme Court of the United States, I convened the West Virginia Debt Commission, and, in conjunction with them, have reached the conclusion that it would be to the advantage of both States to have a joint conference of the two commissions at the earliest date possible.

In the hope that you will give me your views and wishes, and the views and wishes of your Commission upon this subject, at your earliest convenience, I remain,

Yours sincerely,

(signed) Henry D. Hatfield
Governor of West Virginia.

Honorable H. H. Downing, Chairman Debt Commission, Front Royal, Virginia.

WASHINGTON, D. C., November 12, 1915.

Hon. Henry D. Hatfield, Governor of West Virginia, Charleston, W. Va.

DEAR SIR:—I duly received your letter of the 28th ultimo in response to mine of the 19th in relation to the payment of the judgment of the Commonwealth of Virginia against the State of West Virginia recently rendered by the Supreme Court of the United States, and note that, upon consideration thereof, you, in conjunction with the West Virginia Debt Commission had reached the conclusion that it would be to the advantage of both States to have a joint conference of the two Commissions at an early date.

Your letter has been considered by the Virginia Debt Commission and I am instructed by them to say that they will be pleased to meet you and the West Virginia Debt Commission as requested, and receive and consider any communication you may desire to submit; and the Virginia Commission agreeing with your view that this conference should be held at the earliest possible date, I suggest the 23rd day of November at 10 a. m., and The New Willard, Washington, D. C., as the time and place of such meeting.

Respectfully,

(signed) H. H. DOWNING,
Chairman, Virginia Debt Commission.

Kindly send
reply to
Front Royal, Va.

TELEGRAM.

CHARLESTON, W. VA., 11/12/15.

Hon. H. H. Downing,

Your letter of this date to hand and contents noted. I will communicate with you just as soon as I have had opportunity to hear from other members of the West Virginia Commission.

(signed) H. D. HATFIELD.

TELEGRAM.

64 pd. Blue Day Letter.

11/19/15 CHARLESTON, W. VA.

Hon. H. H. Downing, Front Royal, Virginia.

Replying further to your telegram of some days ago, suggesting joint conference of two commissions in Washington on November 23rd, beg to advise that I find it impossible to arrange meeting of West Virginia Commission on that date. Will probably not be able to have meeting before sometime early in December and will advise you later as to date agreeable to West Virginia Commission.

(signed) HENRY D. HATFIELD,
Governor.

Virginia *vs* West Virginia

DECEMBER 6, 1915.

Hon. Henry D. Hatfield, Governor of West Virginia, Charleston, W. Va.

DEAR SIR:—Since your wire of November 19th, I have heard nothing from you with reference to a meeting of the Commissions of Virginia and West Virginia, as requested by you sometime since. Your wire of the 19th of November stated

"Will probably not be able to have meeting before some-"time early in December. Will advise you later as to date "agreeable to the West Virginia Commission."

My commission had hoped to hear from you before this and regret that no time, as yet, has been fixed for the conference. May I hope to hear from you at an early date?

Yours very respectfully,
(signed) H. H. DOWNING,
Chairman Va. Commission.

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ORIGINAL NO. 2 OCTOBER TERM, 1915.

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, Defendant.

ANSWER AND RETURN OF THE STATE OF WEST VIRGINIA TO THE PETITION AND MOTION OF THE COMMONWEALTH OF VIRGINIA FOR A WRIT OF EXECUTION UPON THE JUDGMENT HEREIN.

A. A. LILLY,
Attorney General
of West Virginia.

JOHN H. HOLT,
Special Counsel for State
of West Virginia.

ORIGINAL NO. OCTOBER TERM, 1915.

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, Defendant.

ANSWER AND RETURN OF THE STATE OF WEST VIRGINIA TO THE PETITION AND MOTION OF THE COMMONWEALTH OF VIRGINIA FOR A WRIT OF EXECUTION UPON THE JUDGMENT HEREIN.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of West Virginia, in response to the motion herein, respectfully asserts that the writ of execution prayed by the Commonwealth of Virginia should not be issued, for the following reasons and upon the following grounds:

1. Because the State of West Virginia, within herself, has no power to pay the judgment in ques-

tion, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this Court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her Legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen.

2. Because not only presumptively, but in fact, the State of West Virginia did not, before or at the time of the rendition of the judgment herein, own, and has not since owned, and does not now own, any property, real or personal, except such property as was and is devoted exclusively to public use, and none of the property so devoted may be levied upon or sold under execution.

3. Because Sec. 2 of Article III. of the Federal Constitution, conferring jurisdiction upon this Court to determine "controversies between two or more States", simply referred to the judiciary the settlement of the questions of law and fact involved in such controversies, and the determination, in the form of a judgment, of the rights of the sovereign parties, with the implication that the defeated commonwealth would, in good faith, accept and abide by the judgment so rendered, and voluntarily provide for its satisfaction, and does not make such judgments compulsory, but only persuasive, where they are for money without collateral security, because

not enforceable by execution against public property, or by mandamus infringing the taxing power of the States reserved by the Constitution.

WHEREFORE, this respondent, the State of West Virginia, prays judgment that the writ of execution, sought, as aforesaid, by the Commonwealth of Virginia against her, be denied, and that she be dismissed from further answer to said petition and motion, with her reasonable costs in this behalf expended.

STATE OF WEST VIRGINIA,

By

A. A. LILLY,
Attorney General
of West Virginia.

JOHN H. HOLT,
Special Counsel for State
of West Virginia.

ORIGINAL NO. 2 OCTOBER TERM, 1915.

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, Defendant.

BRIEF OF WEST VIRGINIA IN OPPOSITION TO VIRGINIA'S MOTION FOR AN EXECUTION.

A. A. LILLY,
Attorney General
of West Virginia.

JOHN H. HOLT,
Special Counsel for
State of West Virginia.

June 1, 1916.

ORIGINAL NO. OCTOBER TERM, 1915.

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, Defendant.

BRIEF OF WEST VIRGINIA IN OPPOSITION TO VIRGINIA'S MOTION FOR AN EXECUTION.

STATEMENT OF CASE.

This Court entered a decree on the 14th day of June, 1915, in an equity cause originally instituted therein by the Commonwealth of Virginia against the State of West Virginia, in favor of the former and against the latter State, for the sum of

$12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of five per centum per annum.

On the 19th day of October next following the entry of the decree, the Chairman of the Virginia Debt Commission addressed a letter to the Governor of West Virginia, requesting that provision be made for its payment, and calling attention to the fact that legislative action upon the part of West Virginia would be necessary, and that, as that body would not meet in regular session until January, 1917, suggested that the Governor convene that body in extraordinary session for the purpose of dealing with the subject and making provision for the payment of the decree without unreasonable delay (letter of Chairman of Virginia Commission to Governor of West Virginia, page 5 of Petition for Execution).

On the 28th day of the same month, the Governor of West Virginia replied to the Chairman of the Virginia Debt Commission, acknowledging the receipt of his letter, and stating that he had convened the West Virginia Debt Commission, and had, in conjunction with them, reached the conclusion that it would be to the advantage of both States to have a joint conference of the two Commissions at the earliest date possible (petition for writ, page 6).

Upon the 12th of November, 1915, Mr. Downing, Chairman of the Virginia Debt Commission, replied, upon instruction from his Commission, that they would be pleased to meet the West Virginia Commission, and suggested the 23rd day of November, 1915, as the time, and the City of Washington as

the place for such a conference (petition for writ, page 7).

To this letter the Governor replied by telegram, stating that he would further communicate with the Chairman of the Virginia Debt Commission just as soon as he had had an opportunity to hear from the other members of the West Virginia Commission (petition, page 8); and by another telegram dated the 19th day of November, stated that he would be unable to arrange a meeting for the 23rd of November, and would probably not be able to arrange such meeting before sometime early in December (petition, page 8). On December 6, 1915, the Chairman of the Virginia Commission, having heard nothing further from the Governor of West Virginia, wrote him another letter, reminding him of his telegram of November 19th, and expressing the hope that he might hear from him at an early date (petition, page 9).

The Virginia Commission having received no reply to this last letter of its Chairman, Mr. Downing, a notice, signed by the Attorney General of Virgina, was served upon the Attorney General for West Virginia on the 15th day of May, 1916, to the effect that the State of Virginia would, on the 5th day of June, 1916, move this Court for a writ of execution against the State of West Virginia, directing the Marshal of said Court to levy upon the property of the State of West Virginia subject to such levy for the satisfaction of the decree and judgment aforesaid, and a petition has been presented in support of said motion, setting forth the correspondence hereinbefore outlined.

West Virginia has filed her answer to the motion, wherein she insists that the execution should not be issued as prayed for the following reasons:

> "1. Because the State of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this Court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her Legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen.
>
> 2. Because not only presumptively, but in fact, the State of West Virginia did not, before or at the time of the rendition of the judgment herein, own, and has not since owned, and does not now own, any property, real or personal, except such property as was and is devoted exclusively to public use, and none of the property so devoted may be levied upon or sold under execution.
>
> 3. Because Section 2 of Article III. of the Federal Constitution, conferring jurisdiction upon this Court to determine 'controversies between two or more States', simply referred to the judiciary the settlement of the questions of law and fact involved in such controversies, and the determination,

> in the form of a judgment, of the rights of the sovereign parties, with the implication that the defeated commonwealth would, in good faith, accept and abide by the judgment so rendered, and voluntarily provide for its satisfaction, and does not make such judgments compulsory, but only persuasive, where they are for money without collateral security, because not enforceable by execution against public property, or by mandamus infringing the taxing power of the States reserved by the Constitution."

Each of these objections to the writ will be briefly discussed in its order.

ARGUMET.

I.

WEST VIRGINIA SHOULD BE GIVEN AN OPPORTUNITY TO ACCEPT AND ABIDE BY THE DECREE OF THIS COURT, AND TO PROVIDE IN REGULAR COURSE FOR ITS PAYMENT, BEFORE ANY STEPS LOOKING TO HER COMPULSION BE TAKEN.

The State of West Virginia could, and can, only provide for the satisfaction of this decree through the action of the legislative branch or department of her government, and that body has not been in session since the rendition of this decree, and will not convene again in regular course under the present Constitution of the State until the second

Wednesday in January, 1917, a period of seven months hence (Sec. 18, Art. VI., Constitution W. Va., 1872). West Virginia, therefore, has had no opportunity, prior to the motion now made and pending, to accept and abide by the decree of this Court, and it will not be presumed that she will repudiate the same and refuse to make payment when her Legislature does meet. Under such circumstances, therefore, it is respectfully submitted that the writ of execution should be denied, and the State of West Virginia given an opportunity, at least, to perform her obligations under the Constitution.

Mr. Chief Justice Fuller, speaking for this Court upon the demurrer to the bill in this case, used the following language:

> "The object of the suit is a settlement with West Virginia, and to that end a determination and adjudication of the amount due by that State to Virginia; and when this Court has ascertained and adjudged the proportion of the debt of the original State which it would be equitable for West Virginia to pay, it is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this Court. *If such repudiation should be absolutely asserted, we can then consider by what means the decree may be enforced.* Consent to be sued was given when West Virginia was admitted into the Union, *and it must be assumed that the Legislature of West Virginia would, in the natural course, make provision for the satisfaction of any decree that may be rendered.*" (Italics ours.)

Commonwealth of Virginia v. State of W. Va., 206 U. S., 319; 51 L. Ed., 1080.

Again we have the same just and orderly position taken by this Court in the earlier case of Rhode Island v. Massachusetts, wherein Mr. Justice Baldwin, speaking for a majority of the Court says:

> "This Court cannot presume, that any State which holds prerogative rights for the good of its citizens, and by the Constitution has agreed that those of any other State shall enjoy rights, privileges and immunities in each, as its own do, would either do wrong or deny right to a sister State or its citizens, or refuse to submit to those decrees of this Court, rendered pursuant to its own delegated authority."

Rhode Island v. Massachusetts, 12 Peters, 751; 9 L. Ed., 1271.

It is true that the Governor, under Sec. 19 of Art. 6 of the W. Va. Constitution, "may convene the Legislature by proclamation whenever, in his opinion, the public safety or welfare shall require it"; but such a step could scarcely be taken with convenience and propriety pending the present primaries in the State, or pending the resulting elections that follow in November, and, after that time, there will be a new Legislature to deal with, whose regular biennial session will follow in three months. In any event, the action of the Governor the one way or the other would not be the action of the Legislature, and no inference may be drawn in relation thereto from his conduct.

II.

NOT ONLY PRESUMPTIVELY, BUT IN FACT, THE STATE OF WEST VIRGINIA DID NOT HAVE AT THE TIME OF THE RENDITION OF THE DECREE HEREIN, AND DOES NOT NOW OWN, ANY P ROPERTY, EXCEPT SUCH PROPERTY AS WAS AND IS DEVOTED EXCLUSIVELY TO PUBLIC USE, AND NONE OF THE PROPERTY SO DEVOTED MAY BE LEVIED UPON OR SOLD UNDER EXECUTION.

This Court, as well as the Courts of last resort of the States, has uniformly held that neither the public revenues nor any property, real or personal, devoted to public use, and constituting a part of the machinery of government, may be levied upon or sold on execution.

Klein v. City of New Orleans, 98 U. S., 149; 25 L. Ed., 430.
City of New Orleans v. La. Construction Co., 140 U. S., 654; 35 L. Ed., 556.
Meriwether v. Garrett, 102 U. S., 472; 26 L. Ed., 197.
Carter v. State, 42 La. Ann., 927; 21 Am. St. Rep., 404.

It may be answered, however, that the question whether or not the State of West Virginia has any property which is not devoted to public use, and which would be subject to execution, should be determined upon or by the return of the writ, and not upon the application for the *fieri facias;* and this contention would probably be true upon an applica-

tion for an execution against an individual; but there is a plain distinction to be observed between an individual and a State upon such an application. In the case of an individual, the presumption is that all property owned by him is held to his private use, and subject to the payment of his debts; but, in the case of a State, the presumption is the exact reverse, and the onus or burden to show the contrary is upon the plaintiff in execution.

Curry v. Savannah, 64 Ga., 294; 37 Am. Rep., 74.

Under such circumstances, therefore, in the face of this presumption, and especially in the presence of the allegation in the answer that not only the presumption but the fact is that all of the property of the State of West Virginia in *locus publicus*, should there be, in the first instance, a showing to the contrary, if possible, to the end that the Court may not do a vain and idle thing.

III.

A MERE MONEY JUDGMENT RENDERED BY THIS COURT AGAINST A STATE WAS NOT INTENDED, UNDER SEC. 2 OF ARTICLE III. OF THE FEDERAL CONSTITUTION, TO BE COMPULSORY, BUT PERSUASIVE.

It should be expressly stated at the outset that it is not intended, in this or any other connection, to argue, directly or indirectly, against the jurisdiction of this Court over the present controversy. That question is behind us. Such jurisdiction has

been rightly and inevitably assumed, and carried, with the usual learning and courtesy of this Court, into final judgment; but the Court's attention will be called to the character, effect and consequence of that judgment under the Constitution and the decisions of this Court.

The contention is that Sec. 2 of Article III. of the Federal Constitution, conferring jurisdiction upon this Court to determine "controversies between two or more States", simply referred to the judicial department of the government the settlement of the questions of law and fact involved in such controversies, and the determination, in the form of a judgment, of the rights of the sovereign parties, with the implication that the defeated commonwealth would in good faith, accept and abide by the judgment so rendered, and voluntarily provide for its satisfaction, and does not make such judgments compulsory, but only persuasive, especially where they are for money without collateral security, because not enforceable by execution against public property, or by mandamus infringing the taxing power of the States reserved by the Constitution.

It will be borne in mind that this Court, speaking in this case through Mr. Justice Holmes, has announced that "the case is to be considered in the untechnical spirit proper for dealing with a *quasi* international controversy, remembering that there is no municipal code governing the matter, and that this Court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the Legislature of either State alone" (Va. v. W. Va., 220 U. S., 27; 55 L. Ed., 357); and it is needless to add that neither international nor *quasi*

international controversies, although settled and reduced to the form of a judgment or award by a tribunal of their concurrent selection, result in writs of execution.

Alexander Hamilton, one of the framers of the Constitution, and one of the strongest advocates of its adoption, clearly held this view. In presenting the Constitution to the people of New York, he says, in the 81st number of the Federalist:

> "There is no color to pretend that the State Governments would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint, but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done, without waging war against the contracting State; and to ascribe to the Federal Courts, by mere implication, and in destruction of a pre-existing right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

It is true that he was speaking of suits by individuals against States; but the reasoning, so far as the enforcement of a judgment against a State is concerned, is equally applicable to a suit by a

State against a State. And Chief Justice Marshall, in Cohens v. Virginia, 6 Wheaton, 418, tells us that:

> "The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our Constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors performed in framing the Constitution put it very much in their power to explain the views with which it was framed."

The views of Mr. Webster to the same effect as those expressed in the Federalist were quoted with approval by Mr. Justice Bradley in the case of Hans v. State of Louisiana, 134 U. S., 1; 33 L. Ed., 842, as follows:

> "The security for State loans is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements."
>
> 6 Webster's Works, 537.

To like effect is the reasoning and conclusion of this Court in *ex parte* Kentucky v. Dennison, 24 How., 66; 16 L.Ed., 717. There paragraph two of Sec. 2 of Article IV. of the Federal Constitution, requiring the executive authority of one State to de-

liver up on demand fugitives from justice, and the Act of Congress of 1793, providing the regulations necessary to the execution of such constitutional provision, were construed, and the extent of their force defined. One Willis Lago, indicted in the State of Kentucky for a crime under the laws of that State, fled into the State of Ohio, and a requisition issued by the Governor of Kentucky, under the constitutional provision and Act of Congress aforesaid, upon the Governor of Ohio for his return was denied. Thereupon, the State of Kentucky instituted a mandamus proceeding in the Supreme Court of the United States against the Governor of Ohio, asking that the latter be compelled to obey the requisition; and, although this Court assumed jurisdiction, and held that mandamus was the proper proceeding, if there were any remedy at all applicable to the controversy, it denied the writ, upon the ground that the constitutional provision and the Act of Congress aforesaid only appealed to the moral duty and fidelity of the States, and did not provide "any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power"; and Mr. Chief Justice Taney, who delivered the opinion of the Court, concluded the same with the following language:

> "And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest

would insure a faithful execution of this constitutional provision by the executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty.'

But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him.

And upon this ground the motion for the mandamus must be overruled."

See also Louisiana v. Jummel, 107 U. S., 711;
Rees v. Watertown, 19 Wallace, 107;
Heine v. Levee Comrs., 19 Wallace, 655.

It is true that West Virginia, like the original thirteen Colonies when they adopted the Constitution, consented at the time of her admission into the Union to be sued in this Court by another State; but the power to satisfy the judgment rendered in any suit by execution cannot be implied from such consent. The general doctrine is well illustrated by the case of Carter v. State, 42 Louisiana Annual, 927; 21 Am. St. Rep., 404, wherein the second paragraph of the syllabus reads as follows:

"Statute authorizing suit against State has no effect beyond referring to the judi-

> ciary, for settlement, the questions of law and fact involved in the claims, and the determination, in the form of a judgment, of the rights of the parties. It does not authorize a seizure of State property to satisfy such judgment, and only conveys an implication that the legislature will recognize such judgment as final, and make provision for the satisfaction thereof."

If this be true, it may then be asked, why should the Constitution confer jurisdiction to render judgment against a State, but withhold the power to execute the judgment when rendered? This apparent anomaly is not unknown to the common law, even in the case of controversies between individuals and a State, and, in the case of controversies between States, where natural equity and the rules of international law, rather than of any municipal code, prevail, the same situation is universal.

Time immemorially certain of the English Courts have had jurisdiction to entertain claims against the Crown upon petitions of right, but no execution, in the event of judgment, was ever issued. The questions of law and of fact involved in the controversy were passed upon by the Court exercising jurisdiction, and reduced to the form of a judgment; but the satisfaction thereof was always left to Parliament, and it might or might not pay the debt. In other words, the judgment so rendered was not compulsive, but persuasive.

Macbeth v. Haldimand, 1 Term Rep., 172.

And, when we come to a controversy between two States of the American Union, it will be borne

in mind that the adoption of the Federal Constitution destroyed and put an end to all diplomatic relations betwen the individual States, and it became necessary to establish by that Constitution a high tribunal for the settlement of all controversies between them; but it cannot be supposed, in the absence of express sanctions, that it was the intention to press the judgments of that tribunal beyond the analogies of international law, or to enable it to destroy by compulsory process any of the sovereignties expressly retained by the States.

Neither does the case of South Dakota v. North Carolina, 192 U. S., 286; 48 L.Ed., 448, militate against this view. In that case, the State of North Carolina issued certain State bonds, and secured their payment by a mortgage upon certain railroad stocks owned by her. Afterwards, the State of South Dakota became the owner of certain of these bonds, either through gift or purchase; and, when North Carolina refused to pay them, brought suit to compel payment of the bonds and the subjection of the mortgaged property to the satisfaction of the debt. A decree was entered for the amount of the bonds, and, in default of payment, for the sale at public auction of the railroad stocks that had been pledged for their payment. No property devoted to governmental purposes was involved or sold. It was like the case of a note or bond secured by the delivery of collateral, and, when default was made in the former, the latter was taken in satisfaction; and this Court did not go on and enter judgment for the amount of any deficiency that might remain after the collateral had been exhausted.

Indeed, the question here presented was expressly reserved in that case for future decision, as will appear from the following language used by Mr. Justice Brewer in delivering the majority opinion of the Court:

> "We have, then, on the one hand the general language of the Constitution, vesting jurisdiction in this court over 'controversies between two or more States', the history of that jurisdictional clause in the convention, the case of Chisholm v. Georgia, U. S. v. N. Carolina, and U. S. v. Michigan (in which this Court sustained jurisdiction over actions to recover money from a State), the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expression of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question, it is directly presented, and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties."

A decree of the character entered in the case of South Dakota v. North Carolina would not attack the sovereignty of the State; but a writ of execution to be levied upon the public property of the State, or the

appointment of a receiver to take charge of and appropriate its public moneys, or a commission to extend and collect taxes upon the private property of its citizens, or the issuance of a mandamus to compel or control the exercise of the taxing power of her legislature, either one or all, would cut up by the roots a portion of the very sovereignties that were expressly reserved to the States in the Tenth Amendment to the Constitution.

It is true that this Court held in Wayman v. Southard, 10 Wheaton, 1, that jurisdiction once conferred does not end with the rendition of judgment, but covers final, as well as original, process; and, while this is unquestionably true in ordinary cases, it has no application to the jurisdiction here conferred. The distinction between individuals and States must be observed, as well as the immemorial practice of Courts in dealing with the latter. A jurisdiction extended to controversies between States is not such jurisdiction, to borrow the language of Judge Fenner in Carter v. State, 42 Louisiana Annual, 927, as carries with it "the incidents and appurtenances of ordinary jurisdiction."

Mr. Justice Miller, in concluding his opinion in the case of Heine v. Board of Levee Comrs., 19 Wallace, 655, made use of the following language:

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us, the national sovereignty has nothing to do with it. The power

must be derived from the Legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the Legislature either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal Court. It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose. It is not only not one of the inherent powers of the Court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

Also this Court in Rees v. Watertown, 19 Wallace, 107, said:

"We are of the opinion that this Court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only, and, second, by the power of legislative authority only. It is a power that has not ben extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

The last two cases cited were bills in equity, the first asking that the Levee Commissioners be compelled to levy a tax for the payment of certain bonds, and the second asking the Court to levy such a tax through its own officers, and, although the Court held in each instance that a court of equity had no jurisdiction in the premises for any such purpose, yet it is easy to perceive that the reasoning as embodied in the above expressions would be equally applicable to a writ of mandamus in the nature of an execution, if applied for against a State, as distinguished from one of its corporate subdivisions to which have been delegated the power to levy taxes for the payment of its debts.

Respectfully submitted,

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